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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LARRY WILLIAMS, Defendant and Appellant.	B210088 (Los Angeles County Superior Ct. No. NA078661)

APPEAL from a judgment of the Superior Court of Los Angeles County. James D. Otto, Judge. Dismissed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Victoria B. Wilson and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Larry Williams appeals from the judgment entered following his negotiated plea of no contest to possession of a controlled substance. Appellant contends the magistrate erred by denying his suppression motion. We conclude appellant's claim is not reviewable because he failed to reassert his motion in the superior court.

FACTS

A restraining order prohibited appellant from being within 100 yards of a particular building. Long Beach Police officers who were familiar with appellant and knew of the restraining order saw appellant loitering about 10 yards from the building. When the officers approached, appellant retreated to a truck. The officers ordered appellant to get out of the truck and approach the police car. One of the officers grabbed appellant's left hand in preparation for a patdown search. Appellant dropped a metal pipe of a type commonly used to smoke rock cocaine. The officers arrested appellant, searched him, and found a 0.11 gram bindle containing cocaine base in appellant's pocket.

Appellant filed a suppression motion prior to the preliminary hearing. At appellant's request, the magistrate heard the motion before conducting the preliminary hearing. At the conclusion of the evidentiary hearing for the motion, the parties argued the motion. Appellant conceded the officers were justified in detaining him, but argued the patdown search was improper because the officers did not have a reasonable suspicion he was armed. The magistrate wanted more time to consider the merits of the motion before ruling upon it. Appellant indicated he would waive his right to a continuous preliminary hearing. The parties entered into a stipulation regarding the contents of the bindle found in appellant's pocket. The people rested their case with respect to the preliminary hearing. Appellant stated there would be no affirmative defense. Appellant waived his right to a continuous preliminary hearing, and the court recessed for lunch.

After lunch, the court denied the suppression motion, ruling that the officers had probable cause to arrest appellant for violating the restraining order and were justified in searching him incident to arrest. The court noted it had not yet "ruled on the prelim." Appellant informed the court he wanted to change his plea to no contest and "accept Prop. 36." After being informed of and waiving his constitutional rights, appellant pled no contest to the sole charge of possessing a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in exchange for sentencing under Proposition 36. Appellant waived arraignment for judgment and time for sentencing, and the court suspended imposition of sentence and granted appellant probation under Proposition 36.

Appellant filed a timely appeal.

DISCUSSION

Appellant contends the trial court erred by denying his suppression motion. However, appellant's failure to renew his motion in the superior court created a threshold issue regarding reviewability. At our request, the parties filed letter briefs addressing whether the denial of appellant's suppression motion is reviewable in light of *People v. Lilienthal* (1978) 22 Cal.3d 891 (*Lilienthal*). In *Lilienthal*, the California Supreme Court held that a defendant whose suppression motion was denied at the preliminary hearing must re-raise the matter in the superior court to preserve it for appellate review. (*Id.* at p. 896.)

In *People v. Richardson* (2007) 156 Cal.App.4th 574 (*Richardson*), a superior court judge sitting as a magistrate denied the defendant's suppression motion before the preliminary hearing. Before the magistrate could proceed with the preliminary hearing, Richardson pled guilty under Proposition 36 and agreed to immediate sentencing. The judge suspended imposition of sentence and placed Richardson on probation under Proposition 36. On appeal, Richardson attempted to challenge the ruling on the suppression motion. (*Id.* at pp. 581-582.) After examining the parameters of a magistrate's role, the rationale underlying the *Lilienthal* rule, and the history of the

Lilienthal rule in the wake of trial court unification, the *Richardson* court concluded that "the *Lilienthal* rule continues to apply even in the wake of trial court unification because that rule never rested on the distinction between the municipal court and the superior court; rather, it rests on the distinction between magistrates and superior court judges—a distinction that remains valid even following unification." (*Id.* at p. 589.)

The *Richardson* court further concluded the *Lilienthal* rule applied even though a superior court judge acting in the role of magistrate denied Richardson's suppression motion: "[T]he *Lilienthal* rule requires a defendant to raise the search and seizure before a superior court judge *acting as a superior court judge* to preserve that issue for appellate review." (*Richardson, supra*, 156 Cal.App.4th at p. 591.) "[I]t does not matter for purposes of applying the *Lilienthal* rule that the superior court judge whose judgment we would be reversing here was the same judge who ruled on the suppression motion. Under [Penal Code] section 859c, defendant had the right to have another superior court judge, acting as a superior court judge, review Judge Garrigan's ruling as a magistrate, but he declined to exercise that right when he pled guilty under section 859a. Having failed to avail himself of that right, he cannot now rely on the fact that the magistrate and the superior court judge in this case were the same person to justify deviating from the *Lilienthal* rule." (*Id.* at p. 594.) The court concluded that it is impossible for a defendant who "takes advantage of the certified plea process and pleads guilty before the magistrate following the denial of his suppression motion at the preliminary examination" to satisfy the *Lilienthal* requirement of reasserting the suppression motion in the superior court. (*Id.* at p. 591.) However, no injustice results from this preclusion: "Refusing to recognize an exception to the *Lilienthal* rule in cases involving a guilty plea under section 859a simply means a defendant cannot have his cake and eat it too. After testing the viability of his Fourth Amendment arguments in a motion to suppress before the magistrate and losing, he can choose to either seek a prompt and favorable resolution of the case by pleading guilty under section 859a or pursue his Fourth Amendment arguments in the superior court and on appeal, but he cannot do both." (*Id.* at p. 595.)

Similarly, in *People v. Garrido* (2005) 127 Cal.App.4th 359, the magistrate denied the defendant's suppression motion before the preliminary hearing and the defendant pled guilty rather than proceed with the preliminary hearing. The magistrate certified the case to the superior court, which placed Garrido on probation. (*Id.* at pp. 362-363.) On appeal, Garrido attempted to challenge the denial of her suppression motion. The appellate court held that trial court unification had not abrogated *Lilienthal*. (*Id.* at p. 364.) Garrido's failure to renew her suppression motion in the superior court therefore precluded appellate review under the *Lilienthal* rule. (*Id.* at pp. 364-365.)

As in *Richardson* and *Garrido*, appellant's motion to suppress was made at the time set for his preliminary hearing when Judge Otto was acting as a magistrate, not as a superior court judge. As in *Richardson* and *Garrido*, appellant was never held to answer. He pled no contest before the magistrate immediately after denial of the suppression motion. As in *Richardson*, the magistrate did not certify the case to the superior court pursuant to Penal Code section 859a, but instead, pursuant to the parties' consent, proceeded immediately to the pronouncement of judgment. As in *Richardson* and *Garrido*, appellant did not reassert his suppression motion in the superior court. And just as in *Richardson* and *Garrido*, *Lilienthal* imposes an insurmountable bar to appellate review of the denial of appellant's suppression motion. As the *Richardson* court noted, "if defendant had wanted to pursue his Fourth Amendment arguments, he could have declined to plead under [Penal Code] section 859a and insisted on his right to have another superior court judge, and ultimately (if necessary) this court, review those arguments. By choosing the plea, he forfeited his right to any further review of his argument that he was illegally detained before the police discovered the heroin-filled syringe on him." (*Richardson*, *supra*, 156 Cal.App.4th at p. 595.)

Appellant attempts to distinguish *Richardson* by arguing that he "gave up his right to a preliminary hearing in favor of a limited hearing on his motion to suppress. In so doing, he impliedly asked Judge Otto [to] take off his magistrate robe, reserved for preliminary hearings, and put on his Superior Court robe when deciding the motion to

suppress. As such, there was no need to renew the motion before entering a plea and accepting Proposition 36 probation." The record does not support appellant's characterization of the proceedings. No written or verbal waiver of a preliminary hearing appears in the record. Indeed, the statements of the parties and magistrate during the proceedings indicate the suppression motion was effectively heard at the same time as the preliminary hearing, with the parties' consent. After evidence was taken for purposes of the suppression motion, the prosecutor proceeded with the remainder of her preliminary hearing evidence, which consisted of a stipulation. When appellant announced he would plead no contest, Judge Otto noted he had not yet ruled upon the sufficiency of the prosecution's showing for the preliminary hearing. Judge Otto was necessarily acting as a magistrate at the time he heard the motion and ruled upon it and when appellant changed his plea before the completion of the preliminary hearing. Just as in *Richardson* and *Garrido*, appellant changed his plea before he was able to reassert his suppression motion in superior court. The posture of appellant's case is indistinguishable from *Richardson*. *Lilienthal* therefore constitutes a procedural bar to appellate review of the denial of appellant's suppression motion.

Appellant also argues *Lilienthal* should be reconsidered in light of "the realities of what has been occurring in the Superior Court postunification." Appellant argues that "*Lilienthal* was clearly based on the notion that the Court of Appeal reviews the propriety of the Superior Court's actions but not those of the municipal court." Appellant's contentions regarding the rationale and vitality of *Lilienthal* were rejected in *Richardson*, *supra*, 156 Cal.App.4th at page 589. Appellant has cited no authority for his proposition, and every published decision we have found has concluded *Lilienthal* survived trial court unification. See, e.g., *Richardson*, *supra*, 156 Cal.App.4th 574; *Garrido*, *supra*, 127 Cal.App.4th 359; *People v. Hoffman* (2001) 88 Cal.App.4th 1; *People v. Hinds* (2003) 108 Cal.App.4th 897; and *People v. Hart* (1999) 74 Cal.App.4th 479. For the reasons set forth in those cases, we conclude *Lilienthal* still provides the governing law, which we must follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In his supplemental brief, appellant requests that he be given an opportunity to withdraw his plea. He premises this upon a belief that the trial court "promised appellant he could appeal the denial of his motion to suppress." After explaining its reasons for denying appellant's motion to suppress, but before appellant announced that he wanted to change his plea, the trial court stated, "You're welcome to see if an appellate court wants to clarify the law." However, retaining his right to appeal was not a term of the guilty plea. Neither appellant nor the prosecutor referred to preservation of appellant's right to appeal. When asked, appellant affirmed that, apart from Proposition 36 sentencing, no one had made any promises to him. Nothing in the record shows that the court's comment about clarifying the law regarding the search and seizure issue through appeal played any part in inducing appellant's plea. The record instead indicates appellant always planned to plead no contest in order to receive favorable treatment under Proposition 36 if his motion were denied. Defense counsel informed the court, "I announced to counsel and to the court that it was his intention to run the motion and then plead, and by that I meant accept Prop. 36 afterwards."

Appellant's claim is not reviewable and must be dismissed.

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED.

TUCKER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.